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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

COYOTE CREEK MOBILE HOME
COMMUNITY LLC,

Plaintiff and Appellant,

v.

MICHAEL D. MCCRACKEN,

Defendant and Respondent.

A144006

(San Mateo County
Super. Ct. No. CIV519054)

Coyote Creek Mobile Home Community LLC (Coyote Creek) appeals from a judgment of dismissal entered after the trial court struck its second amended complaint as untimely and subsequently denied leave to file a third amended complaint. Coyote Creek contends the court erred in striking the second amended complaint because it was entitled to relief from the untimely filing under Code of Civil Procedure section 473, subdivision (b), and the court should have stricken the pleading only in part.¹ Coyote Creek further contends the court erred in denying leave to file the third amended complaint, because the court ruled incorrectly that the untimely second amended complaint had superseded the first amended complaint, leaving nothing to amend.

We will vacate the judgment and the order denying leave to file the third amended complaint and remand for further proceedings consistent with this opinion.

¹ Unless otherwise indicated, all statutory references are to the Code of Civil Procedure.

I. FACTS AND PROCEDURAL HISTORY

In January 2013, Coyote Creek and its “managing member,” Jana Yohanan, filed a lawsuit against respondent Michael D. McCracken, an attorney who represented Coyote Creek in one case and Yohanan in another. As relevant here, Coyote Creek sought damages from McCracken with respect to legal fees he charged in Coyote Creek’s litigation against Pacific Gas & Electric Company.

A. Coyote Creek’s Complaint

The complaint purported to allege causes of action for violation of the California Rules of Professional Conduct, violation of the Business and Professions Code, failure to refund excessive attorney fees, breach of fiduciary duty, and negligence.

McCracken filed a demurrer to the complaint, contending that the first cause of action for “Violation of Rules of Professional Responsibility” and second cause of action for “Violation of Business and Professions Code” were not causes of action at all, and the plaintiffs had no private right of action for damages. McCracken also argued that the complaint was uncertain because it did not specify which plaintiff was asserting which cause of action.

Rather than oppose the demurrer, Coyote Creek and Yohanan filed a first amended complaint in May 2015. (See § 472.)

B. Coyote Creek’s First Amended Complaint

The first amended complaint did not contain a cause of action for violation of the rules of professional conduct or violation of the Business and Professions Code. But it still contained references to the rules of professional conduct in discussing McCracken’s conduct as grounds for other causes of action. In addition, Coyote Creek and Yohanan again pleaded their distinct claims within the same counts or causes of action. And the first amended complaint sought statutory penalties and attorney’s fees, without alleging facts supporting that recovery.

McCracken filed a motion to strike the first amended complaint or, alternatively, to strike the references to the rules of professional conduct and the Business and Professions Code, as well as the request for statutory penalties and attorney’s fees. He

also demurred to the first amended complaint, on the ground the claims were barred by the statute of limitations and the pleading was uncertain.

The trial court (Judge Scott) issued tentative rulings with respect to the motion to strike and demurrer. None of the parties contested those rulings, and they became the orders of the court. In his order, Judge Scott denied McCracken's motion to strike the entire first amended complaint and overruled the demurrer as to Coyote Creek's claims.² The court also denied the motion to strike references to Business and Professions Code section 6148. The court granted, *without* leave to amend, McCracken's motion to strike the references to the rules of professional conduct and the prayer for statutory penalties. The court granted, *with* leave to amend, the motion to strike the prayer for attorney's fees, in response to Coyote Creek's request to amend "to more fully allege a written agreement between [McCracken] and Coyote Creek," which purportedly contained an attorney's fees clause.

The court's written order was filed on October 11, 2013, and McCracken served notice of its entry on October 24, 2013. Under the superior court's local rules, the deadline for Coyote Creek to amend its pleading was 10 days from the service of notice of entry. (Super. Ct. San Mateo County, Local Rules, rule 2.3 (D)(3).)

C. Coyote Creek's Second Amended Complaint

Coyote Creek did not file its second amended complaint until January 27, 2014—over two months past the deadline. Although it removed eight references to the rules of professional conduct, one reference remained. Despite having obtained leave to amend in order to allege a contractual basis for fees, Coyote Creek again prayed for attorney's fees without any supporting fact allegations. In addition, Coyote Creek realleged McCracken's purported failure to endorse a Pacific Gas & Electric settlement check (an allegation the court had not previously stricken), despite counsel's earlier representation that the issue was moot.

² The court sustained McCracken's demurrer to Yohanan's claims without leave to amend. Yohanan is not a party to this appeal.

D. McCracken's Motion to Strike the Second Amended Complaint

In February 2014, McCracken filed a motion to strike the entire second amended complaint or, alternatively, to strike the reference to the rules of professional conduct, the attorney's fees prayer, and the allegation that McCracken had refused to endorse the settlement check.

Coyote Creek filed an opposition to the motion on March 17, 2014. It admitted that the second amended complaint was not timely filed and that the reference to the rules of professional conduct and the request for attorney's fees were improper. Coyote Creek argued, however, that relief from the untimely filing should be granted under section 473, subdivision (b) because the late filing was the fault of its attorney, and the court should strike only the reference to the rules of professional conduct and the attorney's fees request. Coyote Creek argued that the settlement check allegation was permissible.

Coyote Creek's attorney, Judy Tsai, submitted a declaration of fault. She admitted that she had not calendared the deadline for filing the second amended complaint. She claimed that she assigned the task of amending the complaint to an associate, but when the associate was terminated from his employment in October 2013, Tsai failed to notice that he had not filed the second amended complaint. According to Tsai, it was not until she was preparing for the case management conference that she discovered the error and caused the second amended complaint to be filed on January 27, 2014.³ Tsai stipulated that the last remaining reference to the rules of professional conduct (which she had failed to remove due to her "haste") and the prayer for attorney's fees could be stricken from the second amended complaint.

The court issued its tentative ruling, granting McCracken's motion to strike the second amended complaint in its entirety. The court explained: "[Coyote Creek] does

³ The record indicates, however, that on November 12, 2013, McCracken's attorney sent an email to Tsai, inquiring whether she intended to file a second amended complaint or "stand on the complaint presently on file," and Tsai responded that he would receive it "before the end of the week," apologizing for the delay because she had been "out all last week." It is unclear why it took Tsai from November 2013 to January 2014 to file the second amended complaint.

not dispute that it failed to file an amended pleading with ten days of notice of entry of the Court's October 11, 2013 Order sustaining, in part, [Coyote Creek]'s demurrer to the FAC and granting, in part, [McCracken]'s motion to strike. The SAC was not filed until January 27, 2014, over three months after it was due. [¶] [Coyote Creek]'s Opposition does not establish sufficient grounds for mandatory or discretionary relief under Code Civ. Proc section 473(b). Further, even if relief were to be granted, the current SAC fails to conform to the Court's October 11, 2013 Order. Accordingly, the SAC is stricken in its entirety."

Neither party provided proper notice that it would contest the tentative ruling. Tsai notified McCracken's attorney of her intent to appear a day before the hearing—but that day was a court holiday. Nonetheless, both Tsai and McCracken's attorney showed up in the courtroom.

After dealing with the cases in which attorneys were scheduled to appear, the court turned to McCracken's motion. The court confirmed that Coyote Creek had not given proper notice of its intention to contest the tentative ruling, but noting the presence of counsel for both sides, the court asked Tsai her basis for opposing the tentative. The following colloquy ensued. "MS. TSAI: Your Honor, actually, I'm here to ask for some clarification. The motion was brought to strike the Second Amended Complaint, and I read your tentative. The request was also— [¶] THE COURT: So, *the First Amended Complaint is now the operative pleading*, if that's the guidance you were seeking. [¶] MS. TSAI: Well, Your Honor, actually, I prepared a Third Amended Complaint. [¶] THE COURT: Well, you are going to have to bring a motion for leave to file. [¶] MS. TSAI: I have that. [¶] THE COURT: That's not the way it works. You are going to have to file the motion, obtain a date, serve the other side. We are not dealing with that today, if that is what you were hoping. [¶] MS. TSAI: I recognize that. It was just that the tentative didn't say whether leave to amend was granted or not granted. The request was to strike without leave to amend. . . . [¶] THE COURT: *The motion is granted without prejudice to bring[ing] a motion to file a Third Amended Complaint*, and it could be dealt with on its merits. [¶] *Mr. Blackman [McCracken's attorney], we'll ask*

you to prepare a— [¶] MR. BLACKMAN: I will. [¶] THE COURT: *—a written order to that effect.* [¶] MR. BLACKMAN: Thank you, Your Honor. [¶] THE COURT: Thank you. [¶] MS. TSAI: Thank you so much, Your Honor. [¶] THE COURT: Thank you. [¶] *Other than that*, the tentative ruling is adopted as the order of the Court.” (Italics added.)

McCracken’s lawyer prepared a proposed order after the hearing, but omitted the court’s directive that Coyote Creek could bring a motion to file a third amended complaint. Coyote Creek’s attorney nonetheless approved the form of the order.

In its final form, the written order granted McCracken’s motion to strike Coyote Creek’s second amended complaint in its entirety, noting that Coyote Creek failed to file the pleading by the deadline, Coyote Creek failed to “establish sufficient grounds for mandatory or discretionary relief” under section 473, subdivision (b), and in any event the second amended complaint did not conform to the order permitting the filing of an amended pleading.

E. Coyote Creek’s Motion to File a Third Amended Complaint

On the same day as the hearing on the motion to strike the second amended complaint, Coyote Creek filed a motion for leave to file a third amended complaint. Coyote Creek based the motion on section 472a, subdivision (d), and asserted it was “in the interests of justice and of judicial efficiency to allow the proposed amendment in that the amendment is related to the subject matter of the existing controversy between the parties and will not result in prejudice to the Defendant.”

Attached to Coyote Creek’s motion was the proposed third amended complaint, which deleted the reference to the rules of professional responsibility and deleted the request for attorney’s fees from the prayer, so that the pleading was in compliance with the order striking those items from the first amended complaint. In addition, the third amended complaint added four words to the allegation that McCracken had a fiduciary duty to hand over settlement monies, such that the duty was allegedly to deliver the proceeds “immediately upon receipt thereof.”

McCracken opposed Coyote Creek's motion to file the third amended complaint, arguing that the second amended complaint became a nullity once the court struck it without granting leave to amend, and it was therefore incapable of amendment. McCracken also argued that Coyote Creek had not complied with rule 3.1324 of the California Rules of Court, including an explanation of Coyote Creek's delay in seeking leave to amend.

The motion was assigned to Judge Novak, who issued a tentative ruling on May 13, 2014, denying Coyote Creek's request for leave to file the third amended complaint. Coyote Creek contested the tentative ruling. At the hearing, after Tsai noted that Judge Scott had decided the first amended complaint was the operative pleading after striking the second amended complaint, Judge Novak expressed agreement that the first amended complaint would be the operative pleading because the second amended complaint was a nullity. Nevertheless, the court continued the hearing to May 29, 2014, to allow Tsai to provide a transcript of the hearing before Judge Scott and to give the parties the opportunity to file supplemental briefs.

Coyote Creek filed a supplemental brief and a request for judicial notice of the transcript of the hearing before Judge Scott. The supplemental brief noted that Judge Scott had instructed McCracken's attorney to prepare an order indicating the motion to strike was granted without prejudice to Coyote Creek bringing a motion to file a third amended complaint.

McCracken's supplemental brief argued that the second amended complaint superseded the first amended complaint, and Judge Scott's order striking the second amended complaint did not revive the first amended complaint. Since no operative pleading was in existence, McCracken argued, there was nothing to amend.

Judge Novak issued another tentative ruling denying leave to file the third amended complaint, this time agreeing with McCracken that the second amended complaint superseded the first amended complaint, and the first amended complaint was not revived when the second amended complaint was stricken. At the reconvened hearing on May 29, 2014, the court reiterated this view and observed that, although Judge

Scott had allowed Coyote Creek to bring a motion for leave to file a third amended complaint, that did not mean leave would actually be granted.

By written order filed on July 23, 2014, Judge Novak denied Coyote Creek's motion for leave to file its third amended complaint. Judge Novak repeated the analysis from her tentative ruling, highlighted part of the litigation chronology, and added a further explanation. The written order stated: "This matter was continued from May 14, 2014 to allow the parties an opportunity to provide the Court with authority for their respective positions relating to the status of the First Amended Complaint upon the action of Judge Scott striking the second amended complaint filed belatedly and without authorization. . . . Defendant has cited case law which establishes that when a plaintiff files an amended complaint, the prior complaint is superseded for all purposes. The prior pleading is not revived by the later striking of the amended pleading. Judge Scott's order of April 16, 2014 striking Plaintiff's Second Amended Complaint did not revive the First Amended Complaint. It is well-established that an amended pleading supersedes the original one, which ceases to perform any function of the pleading. *State Compensation Ins. Fund v. Superior Court* (2010) 184 Cal App 4th 1124, 1130–1131. And where the amended complaint contains defects that cause it to be stricken, the former complaint is not revived. *Anmaco, Inc. v. Bohlken* (1993) 13 Cal App 4th 891, 901. . . . [¶] Because Judge Scott ordered the late-filed SAC stricken, no operative pleading exists. What Plaintiff seems to be doing is seeking reconsideration of Judge Scott's order, but is doing so in such a manner not proscribed by law. There is no basis to grant her motion to file a Third Amended Complaint, for she forfeited the opportunity to cure the defects in the SAC by not filing one in a timely manner. In summary, Judge Scott struck the SAC and denied Plaintiff's excuse for not timely filing the SAC. Simply seeking leave to amend under another statute, Sec. 472a is an attempt to avoid the consequences of Judge Scott's ruling without seeking reconsideration from him. Even if this were considered as a motion for reconsideration, Plaintiff has not satisfied the necessary elements by demonstrating in a declaration the new facts or change in the law justifying the relief sought."

F. Coyote Creek’s Motion for Entry of Dismissal

Because the denial of a motion for leave to file an amended complaint is not in itself an appealable order, Coyote Creek filed a motion for entry of a judgment of dismissal. McCracken did not oppose the motion, and the dismissal was filed in October 2014. This appeal followed.

II. DISCUSSION

Coyote Creek contends the trial court erred by (1) striking the untimely second amended complaint and (2) denying its motion for leave to file a third amended complaint. We discuss the issues in turn.

A. Order Striking Second Amended Complaint

A court has discretion to strike a pleading, or any part of the pleading, “not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court.” (§ 436, subd. (b).) A pleading may thus be stricken if it is not filed within the time allowed by court order or court rule. (E.g., *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 613 (*Leader*).)

Here, there is no dispute that the second amended complaint was not filed by the deadline. Coyote Creek’s arguments—that relief should have been provided under section 473 and the court should have merely stricken the improper rule reference and fee request—are unavailing.

1. Section 473, Subdivision (b)

Coyote Creek first contends the court abused its discretion in ruling that it had failed to establish sufficient grounds for relief under section 473, subdivision (b). The argument is meritless.

a. Mandatory Relief Provision

The mandatory relief provision in section 473 states: “Notwithstanding any other requirements of this section, the court shall, *whenever an application for relief is made* no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney’s sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting *default* entered by the clerk against his or her client, and

which will result in entry of a default judgment, or (2) resulting *default judgment or dismissal* entered against his or her client, unless the court finds that the default or dismissal was not in fact *caused* by the attorney’s mistake, inadvertence, surprise, or neglect.” (Italics added.)

This provision is unhelpful to Coyote Creek for two reasons. First, it allows relief from a prior order upon “application.” Coyote Creek did not file a motion or other application for relief from any prior order, or even a motion for relief from its untimely filing. The mandatory relief provision of section 473, by its terms, therefore does not apply. (*Leader, supra*, 89 Cal.App.4th at p. 616 [mandatory relief provision of § 473 is not a proper basis for opposing a motion to strike an untimely complaint].)

Second, Coyote Creek’s attorney’s neglect in failing to timely file the second amended complaint did not result in a “default[,] . . . default judgment or dismissal. . . .” (§ 473, subd. (b).) Instead, it resulted merely in the striking of the second amended complaint. Although a dismissal was entered in the case later on, that was at Coyote Creek’s request, not as a direct result of the failure to timely file the second amended complaint, but due to Coyote Creek’s desire to appeal from the order denying its request for leave to file the *third* amended complaint. No “dismissal” was “caused” by counsel’s neglect. Accordingly, the mandatory relief provision of section 473 does not apply.⁴

b. Discretionary Relief Provision

The discretionary portion of section 473 reads: “The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or *excusable* neglect.” (§ 473, subd. (b). Italics added.)

⁴ Furthermore, even if the neglect of Coyote Creek’s counsel had led to the dismissal, it is not the type of dismissal covered by the attorney-fault provision of section 473. (See, e.g., *Leader, supra*, 89 Cal.App.4th at pp. 619–620 [mandatory relief provision of § 473 does not apply to a dismissal based on the failure to file an amended complaint after a demurrer has been sustained with leave to amend, at least where the dismissal was entered after a hearing on noticed motion in which the court evaluated the reasons for delay in determining whether to allow the belated amended pleading].)

“Excusable neglect” arises if “ ‘ “a reasonably prudent person under the same or similar circumstances” might have made the same error.’ ” (*Solv-All v. Superior Court* (2005) 131 Cal.App.4th 1003, 1007.) Relief under the discretionary provision of section 473 requires the party to show not just a satisfactory excuse for a default, but also diligence in bringing a motion for relief. (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1419–1420.)

Coyote Creek did not present this theory in its opposition to the motion to strike. In any event, Coyote Creek does not show that its counsel’s neglect in failing to timely file the second amended complaint was *excusable*. Tsai admitted that she failed to properly calendar the deadline for filing the second amended complaint. Her declaration shows that she failed to monitor the filing that she had assigned to an associate. Although the associate left her firm in October 2013, there is no indication why the pleading could not have been filed by the deadline (since it was due in November) or why it was not filed until months later in January 2014. Coyote Creek provides no authority holding that it would be an abuse of discretion to conclude that counsel’s conduct was not “excusable neglect” within the meaning of section 473, subdivision (b).

Coyote Creek argues that relieving Coyote Creek from its untimely filing would not have prejudiced McCracken. But since Coyote Creek has not established that its neglect was excusable, we need not decide whether allowing the second amended complaint would have been prejudicial. (*Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1187 [“A court cannot set aside a default or default judgment simply because the opposing party has not been prejudiced.”].) Coyote Creek fails to demonstrate error on this ground.

2. The Court Did Not Err in Declining to Redraft the Pleading

Coyote Creek next contends the court should have merely stricken the improper reference to the rules of professional conduct and request for attorney’s fees from the second amended complaint, rather than striking the pleading entirely. This is so, Coyote Creek contends, because Tsai’s neglect “did not substantially affect the rights of McCracken.” (Citing § 475 [“The court must, in every stage of an action, disregard any

error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties.”].)

Coyote Creek is incorrect. Although a trial court must disregard errors that do not affect the substantial rights of the parties (§ 475), Coyote Creek provides no authority for concluding that the court in this case had to turn a blind eye to Coyote Creek’s disobedience of a prior order. Indeed, regardless of how the court could have addressed the improper allegations, it was appropriate for the court to strike the second amended complaint in its entirety because the pleading had not been filed by the deadline.

The trial court did not err in striking the second amended complaint.

B. Denying Leave to File the Third Amended Complaint

With the second amended complaint being stricken, Coyote Creek sought leave to file a third amended complaint under section 472a, subdivision (d), which reads in part: “If a motion to strike is granted pursuant to Section 436, the court may order that an amendment or amended pleading be filed upon terms it deems proper.” This statute authorizes a court to grant leave to amend *when* it grants a motion to strike. But nevertheless, a trial court has broad discretion to allow a party to amend its pleadings, at any stage of the proceedings. (See § 473, subd. (a)(1).)

As a general rule, leave to amend is liberally granted. (*Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 938–939; *Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1428.) However, if the party proposing the amendment delayed in offering it, and this delay prejudiced the opposing party, the court has discretion to deny leave to file it. (*Hirsa v. Superior Court* (1981) 118 Cal.App.3d 486, 490; see *Bedolla v. Logan Frazer* (1975) 52 Cal.App.3d 118, 136 [unexplained delay in presenting proposed amendment is “itself a significant factor to uphold the trial court’s denial of the amendment”]; *Roemer v. Retail Credit Co.* (1975) 44 Cal.App.3d 926, 939–940 [“even if a good amendment is proposed in proper form, unwarranted delay in presenting it may—of itself—be a valid reason for denial”]; *Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564–565 [delay is insufficient to deny leave to amend unless it was prejudicial].)

Therefore, the essential question in deciding Coyote Creek's motion for leave to file the third amended complaint was this: was Coyote Creek's delay in seeking to file the pleading, which added four words to an existing allegation and complied with the court's prior ruling to delete certain allegations, prejudice McCracken?

1. Trial Court's Ruling

The trial court did not consider whether the proposed third amended complaint should be filed based on the foregoing considerations. Instead, it denied leave to file the pleading on the grounds that the filing of the second amended complaint superseded the first amended complaint; the striking of the second amended complaint did not revive the first amended complaint, leaving no operative pleading in existence; and Coyote Creek was effectively seeking reconsideration of Judge Scott's order striking the second amended complaint, to no avail. Led astray by McCracken's arguments, the trial court erred.

2. The First Amended Complaint Became the Operative Pleading

It is true that the filing of a second amended complaint supersedes a first amended complaint. (*State Compensation Ins. Fund v. Superior Court* (2010) 184 Cal.App.4th 1124, 1130–1131.) Here, however, the second amended complaint was *void* because it was not filed in conformity with the order that had permitted an amended pleading. Since the second amended complaint was void ab initio (as opposed to being deficient from a pleading perspective), the pleading had *no effect*, and it was as if the pleading had never been filed. The first amended complaint, to which the prior demurrer had been overruled and the motion to strike the entire pleading had been denied, was still in existence. Thus, with the second amended complaint stricken as a nullity, the first amended complaint was the operative complaint (although the reference to the rules of professional responsibility and attorney's fees request were stricken).

The case on which McCracken (and ultimately the trial court) relied is inapposite. In *Anmaco, Inc. v. Bohlken* (1993) 13 Cal.App.4th 891 (*Anmaco*), the defendant brought a motion for judgment on the pleadings as to three remaining causes of action in the case—specifically, the twelfth, thirteenth and fourteenth causes of action. (*Id.* at p. 896.)

The court denied the motion as to the twelfth cause of action and granted it as to the thirteenth and fourteenth causes of action, with leave to amend. (*Ibid.*) Plaintiffs then filed another complaint, which amended the thirteenth and fourteenth causes of action but also improperly added another defendant and other allegations. (*Ibid.*) The court *struck this pleading in its entirety* with leave to amend. Plaintiffs then *failed to file a new amended pleading* within the time allotted. Defendant moved for dismissal, erroneously informing the court that the earlier judgment on the pleadings had been granted as to all three causes of action. The trial court dismissed the case. (*Id.* at pp. 896–897.)

On appeal, the court in *Anmaco* upheld the dismissal. It was of no moment that the twelfth cause of action had actually survived the motion for judgment on the pleadings on the earlier complaint, because that earlier complaint was superseded by the next pleading, which the court struck in its entirety. And because the court struck that pleading in its entirety, the plaintiff’s failure to file a *new* complaint meant there was no longer any operative pleading, and dismissal was appropriate. (*Anmaco, supra*, 13 Cal.App.4th at p. 901.)

Anmaco is distinguishable from the matter at hand. In *Anmaco*, the preceding complaint had been stricken *in its entirety*, so the plaintiff’s failure to timely file a new pleading meant there was no operative pleading. Here, by contrast, the preceding (first amended) complaint was *not* stricken in its entirety; the court had *denied* the motion to strike the entire pleading, and *overruled* the demurrer with respect to the causes of action brought by Coyote Creek. So Coyote Creek’s failure to timely file a *new* (second amended) complaint merely meant the preceding (first amended) complaint remained in existence.

Looking at it slightly differently, by failing to amend in *Anmaco*, the plaintiff forfeited the right to establish an operative pleading; by failing to amend in this case, Coyote Creek merely forfeited the right to add facts to support its attorney’s fee request.⁵

⁵ McCracken represents that “*Anmaco* is no anomaly; cases decided both before and since recognize that well-settled principle.” But the 19 cases McCracken string-cites simply assert the general idea that an amended pleading supersedes prior pleadings; not

Our conclusion is supported not only by the law, but by fairness and common sense. This is not a case in which the second amended complaint abandoned claims in a prior pleading and was then stricken in its entirety due to the inclusion of inappropriate matter; Coyote Creek’s second amended complaint was a nullity. McCracken does not explain why, in equity or logic, Coyote Creek should be held to forfeit the causes of action that had been upheld against his demurrer and motion to strike (except for a few allegations), merely because it did not timely add to them.

3. The Court Must Determine Whether Leave Should be Granted

As mentioned, at the time of the hearing on Coyote Creek’s motion for leave to file a third amended complaint, the first amended complaint *was* in existence, so the striking of the second amended complaint provided no basis for Judge Novak’s denial of Coyote Creek’s motion for leave to file a third amended complaint, and the court should have considered the motion on its merits, under the appropriate standard.

Moreover, even if *Anmaco* did apply and the striking of the second amended complaint did mean there was no longer any operative pleading, the trial court still should have considered Coyote Creek’s request to file the third amended complaint on the merits. After all, that is what Judge Scott and the parties had anticipated. Judge Scott stated that the motion to strike the second amended complaint was “granted *without prejudice to bring[ing] a motion to file a Third Amended Complaint*, and it could be *dealt with on its merits.*” (Italics added.) The court charged McCracken’s attorney with preparing “a written order to that effect,” and the tentative ruling was adopted as the

one of them holds that, where an amended pleading is stricken as untimely, the immediately preceding pleading is forfeited even though it stated viable causes of action. (See, e.g., *Morehead v. Turner* (1940) 41 Cal.App.2d 414, 418 [amended complaint supersedes original complaint]; *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1054 [filing first amended complaint renders a demurrer to the original complaint moot]; *State Compensation Ins. Fund v. Superior Court*, *supra*, 184 Cal.App.4th at pp. 1130–1131 [amended pleading renders moot a motion for summary adjudication based on prior pleading]; *People ex rel. Strathmann v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 506 [filing of first amended complaint rendered the demurrer to the original complaint moot].)

court's order with that modification. The fact that the written order is silent on the issue of amendment is due to the omission by McCracken's lawyer, and it is reasonable under these circumstances to look to the court's contemporaneous oral statements to discern the order's intended effect.

Furthermore, Coyote Creek's motion for leave to file a third amended complaint cannot be summarily denied on the ground it was effectively a motion to reconsider the striking of the second amended complaint. The issue in deciding whether to grant leave to file the third amended complaint was whether delay in the filing of the third amended complaint was prejudicial to McCracken; the main issue in deciding whether to strike the second amended complaint was whether the pleading was filed after the deadline.

Of course, the *facts* that led Judge Scott to reject Coyote Creek's section 473 arguments and strike the second amended complaint may (or may not) also contribute to the court's decision whether to deny Coyote Creek leave to file the third amended complaint. But the point is that it is the trial court that must make this determination: was there a prejudicial delay in filing the third amended complaint, where the third amended complaint omits what the court ordered omitted, but added four additional words. We express no opinion on how the issue should be resolved—only that it must be the trial court that resolves it in the first instance.⁶

4. Conclusion

Because the trial court denied the motion for leave to file a third amended complaint on erroneous grounds, but did not address the propriety of leave to file the third amended complaint on proper grounds, we will vacate the trial court's order and

⁶ In the same vein, we appreciate Judge Novak's implicit concern that a plaintiff, whose pleading was stricken because it was untimely filed, is essentially getting a second bite at the apple by later seeking leave to file that pleading, or a similar one, under section 473, subdivision (a). However, Coyote Creek's third amended complaint was different from the second amended complaint, and a different standard applied to the motion before Judge Novak. The record does not demonstrate that Judge Novak exercised her discretion under the proper standard.

remand for further consideration of the motion for leave to file the third amended complaint.

If the trial court grants leave to file the third amended complaint (and the third amended complaint is filed), it will be the operative pleading in the case. If the trial court denies leave to file the third amended complaint, the first amended complaint is the operative pleading subject to the court's order striking the references to the rules of professional responsibility and the attorney's fees prayer (as well as its order with respect to the claims brought by Yohanan).

III. DISPOSITION

The judgment of dismissal and the order denying Coyote Creek leave to file a third amended complaint are vacated. The matter is remanded for the trial court to rule on the motion for leave to file the third amended complaint, and for such further proceedings as may be consistent with prevailing law and this opinion. Coyote Creek shall recover its costs on appeal from McCracken.

NEEDHAM, J.

We concur.

SIMONS, ACTING P.J.

BRUINIERS, J.